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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

HIEN NGUYEN,

Defendant and Appellant.

A147843

(Alameda County
Super. Ct. No. H57485)

THE COURT:*

Before the court is the People's motion to dismiss this appeal, invoking the disentitlement doctrine. The People argue that appellant Nguyen's fugitive status should bar review of his appellate claims. We agree and dismiss the appeal.

BACKGROUND

In October 2015, Nguyen was convicted of transporting marijuana (Health & Saf. Code, former § 11360, subd. (a)), driving with a suspended license (Veh. Code, § 14601.1, subd. (a)), and possession of more than 28.5 grams of marijuana (Health & Saf. Code, former § 11357, subd. (c)). The trial court suspended imposition of sentence, placed Nguyen on informal probation for three years, and ordered Nguyen to appear on April 5, 2016, for a progress report before Department 519 of the Alameda County Superior Court. Trial court minutes submitted by the People show that date was later vacated and, because the trial judge was transitioning to another assignment, the progress

* Before Jones, P.J., Needham, J. and Bruiniers, J.

report hearing was continued to April 6, 2016, in Department 106.¹ Nguyen filed a timely notice of appeal, but failed to appear on April 6, 2016. The April 6, 2016 minutes also show Nguyen's probation was revoked and a bench warrant was issued for his arrest.

On March 6, 2017, after Nguyen's appellate counsel filed an opening brief, the Attorney General's office learned of the outstanding bench warrant for Nguyen's arrest. The supervising deputy attorney general submitted a declaration, in support of the People's motion to dismiss, stating he searched the California Law Enforcement Telecommunications System and found an outstanding bench warrant for Nguyen's arrest. The existence of the outstanding warrant was confirmed by the Alameda County Sheriff's Office.

On April 17, 2017, this court issued the following order: "The Attorney General has moved to dismiss the appeal, contending appellant Hien Nguyen has absconded and is the subject of an outstanding arrest warrant. The motion to dismiss is set for oral argument on May 25, 2017, at 10:00 a.m. If appellant Nguyen provides evidence to this court, on or before May 24, 2017, that he has surrendered on the warrant, or that the warrant has been withdrawn, the motion will be taken off calendar."²

At oral argument, Nguyen's appellate counsel conceded Nguyen had not surrendered on the outstanding bench warrant. Nguyen's appellate counsel also conceded Nguyen has failed to comply with the terms of his probation.

DISCUSSION

Disentitlement is "a doctrine by which an appellate court may stay or dismiss an appeal by a party who has refused to obey the superior court's legal orders." (*In re E.M.* (2012) 204 Cal.App.4th 467, 474.) "[I]t has long been the rule in California that a court may dismiss the appeal of a fugitive from justice. [Citations.] . . . [¶] Appellate

¹ The People have asked this court to take judicial notice of the trial court records attached to an April 10, 2017 letter to the court. Because the attachments to the April 10 letter are court records, this court may take judicial notice of the attachments, and we grant the request. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

² The order was served on Nguyen's appellate counsel, not on Nguyen personally.

disentitlement based on fugitive status is not a jurisdictional doctrine, but a discretionary tool that may be applied when the balance of the equitable concerns make it a proper sanction for a party's flight. [Citation.] Various justifications have been advanced for its application: (1) assuring the enforceability of any decision that may be rendered on or following the appeal [citations]; (2) imposing a penalty for flouting the judicial process [citation]; (3) discouraging flights from justice and promoting the efficient operation of the courts [citations]; and (4) avoiding prejudice to the other side caused by the defendant's escape [citation]." (*People v. Puluc-Sique* (2010) 182 Cal.App.4th 894, 897–898 (*Puluc-Sique*); *People v. Kubby* (2002) 97 Cal.App.4th 619, 621 (*Kubby*) [" 'a convicted defendant who becomes a fugitive from justice forfeits the right to appeal that conviction' "].)

"Appellate disentitlement is, fundamentally, a doctrine based on forfeiture: a defendant who escapes or otherwise flees the authorities gives up the right to challenge a conviction or sentence while refusing to abide by its consequences." (*Puluc-Sique, supra*, 182 Cal.App.4th at p. 898.) The rationale underlying the doctrine is that a party to an action cannot seek the aid and assistance of an appellate court while standing in an attitude of contempt to the legal orders and processes of the courts of this state. (*Stoltenberg v. Ampton Investments, Inc.* (2013) 215 Cal.App.4th 1225, 1229; *In re E.M., supra*, 204 Cal.App.4th at p. 474.)

Not every charged violation of a term of probation that results in the issuance of a bench warrant can serve as a basis for dismissal of an appeal. In *Puluc-Sique*, this court declined to apply the disentitlement doctrine to the case of a criminal defendant who was involuntarily deported after he filed his appeal. (*Puluc-Sique, supra*, 182 Cal.App.4th at pp. 896, 900–901.) "But where it is undisputed that the [defendant] has fled the jurisdiction to avoid his jail term, he forfeits his right to invoke the court's jurisdiction on appeal because '[i]t would be a farce to proceed in a criminal cause, unless the Court had control over the person charged, so that its judgment might be made effective.' " (*Kubby, supra*, 97 Cal.App.4th at p. 627.)

The issue before us is not whether Nguyen has violated probation but whether he has fled or hidden from the court, thus warranting the dismissal of his appeal. Here, Nguyen not only failed to comply with the probation order of the court entered as part of the judgment he now seeks to appeal, but he has been on notice since at least the People's March 7, 2017 dismissal request that his failure to submit to the jurisdiction of the trial court jeopardized his right to seek relief from this court. On April 17, we advised Nguyen, through counsel, that we would hear oral argument on the People's motion to dismiss on May 25, but would take the motion off calendar if he provided evidence before that date of surrender on the warrant, or recall of the warrant.³ He failed to do so, and he has provided no evidence subsequent to the hearing that he has submitted to the court's jurisdiction. Because Nguyen has now had repeated opportunities to surrender or attempt to have the warrant withdrawn, the reasonable inference is that he is willfully evading the jurisdiction of the trial court. " 'One who, with knowledge that he is being sought pursuant to court process in a criminal action, absents himself or flees is a fugitive from justice.' " (*Kubby, supra*, 97 Cal.App.4th at p. 624.)

The appellate record, judicially noticeable facts, and concessions of Nguyen's appellate counsel demonstrate Nguyen is currently a fugitive. Despite having ample opportunity to surrender on an outstanding bench warrant, Nguyen has willfully flouted the authority of the court.

DISPOSITION

The appeal is DISMISSED.

Dated: _____ P.J.

³ Nguyen's appellate counsel suggests Nguyen may have never received notice of the revised date and location of the April 6, 2016 trial court hearing because he had recently moved to San Francisco and the notice had been sent to an old Dublin address. However, the trial court's notice of continuance indicates Nguyen's trial counsel was also notified of the new date and location. Moreover, Nguyen's counsel made no contention that Nguyen's listed address with this court is incorrect, and in fact asserted that Nguyen currently resided at that location. Nguyen was therefore well aware, through counsel, of at least the existence of this court's order.